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No. 90-770

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Petitioners,

VS.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Statement of Position	1
Additional Statement of Facts	3
Reasons For Granting So Much Of The Writ As Seeks Review Of The Court Of Appeals Reversal Of The District Court's Finding Of Fact In Apparent Violation Of Rule 52(a), Federal Rules Of Civil Procedure	5
A. Judgments and Opinions Below	
B. The Split In The Circuits	10
C. Failure Of The Second Circuit To Follow Both Its Own Precedent And The Federal Labor Law	16
D. Conclusion	21
Reasons For Granting So Much Of The Writ As Seeks Review Of The Reversal Of The District Court By Holding That, Conditional On The Determination Of Two Facts On Remand, Local 501, As An Entity, Is Liable For Breach Of Its Duty Of Fair Representation Based Solely On Unauthorized	

And Unratified Conduct Of Two Of Its Officers, Which Conduct Is Contrary To The Stated Policy Of The Union And To The Expressed Preference Of Local 501's Executive Board. 23

Conclusion 33

TABLE OF AUTHORITES

Cases	Page
American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982)	27
Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985)	23
Breininger v. Sheet Metal Workers, ___U.S.___, 110 S. Ct. 424 (1989)	31, 32
Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212 (1979)	16-17, 21-22, 26, 29
Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F. 2d 1098 (6th Cir. 1986), cert. denied 479 U.S. 1086 (1987)	8, 11, 20

Complete Auto Transit v. Reis, 451 U.S. 401 (1980) 26, 29

Consolidated Coal Co. v. United Mine Workers, 725 F. 2d 1258 (10th Cir. 1984) 12

Dogherra v. Safeway Stores, Inc., 679 F. 2d 1293 (9th Cir. 1982), cert. denied 459 U.S. 990 (1982) 11,12

Drexel v. Union Prescription Centers, Inc., 582 F. 2d 781 (3d Cir. 1978) 13

Gizzi v. Texaco, Inc., 437 F. 2d 308 (3d Cir. 1971) 13

Goclowski v. Penn Central Transportation Co., 571 F. 2d 747 (3d Cir. 1978) 19-20

Karavos Compania Naviera v. Atlantica Export Corporation, 588 F. 2d 1 (2d Cir. 1978) 10, 13, 21

Kitchen Fresh, Inc. v. NLRB, 716 F. 2d 351 (6th Cir. 1983) 12

Lee v. Jenkins Brothers, 268 F. 2d 357 (2d Cir. 1959), cert. denied 361 U.S. 931 (1959) 14, 15

Metco Products, Inc. v. NLRB, 884 F. 2d 156 (4th Cir. 1989) 8

Moreau v. James River-Otis, Inc., 767 F. 2d 6 (1st Cir. 1985) 12-13, 20

Mullett v. NLRB, 571 F. 2d 1292 (4th Cir. 1978) 12

National Association for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886 (1982) 26, 39-30

NLRB v. Local 815, International Brotherhood of Teamsters, 290 F. 2d 99 (2d Cir. 1961) 8

North River Energy Corp. v. United Mine Workers, 664 F. 2d 1184 (11th Cir. 1981 12

Utica Mutual Insurance Company v. Firemen's Fund Insurance Companies, 613 F. Supp. 1134 (S.D.N.Y. 1985) 16

Other Authorities

A.L.I., Restatement, Second, Agency, section 8, comment (c) 17

section 9 18

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Statement of Position

Respondent Local Union No. 501 of International Brotherhood of Electrical Workers, AFL-CIO (Local 501

or Union) supports the petition for certiorari.

Certiorari should be granted to review that part of the judgment and opinion of the Court of Appeals which set aside findings of fact not clearly erroneous. The action of the Court of Appeals for the Second Circuit is a result of a combination of its own view of Rule 52(a), F.R.C.P., which view is at odds with the position of other courts of appeal, and a blatant failure to follow its own decisions even within its particular position on the applicability of the rule. The split in the circuits should be resolved and directions for the proper application of Rule 52(a) to the facts of this case should be given.

Certiorari should be granted to

review that part of the judgment and opinion which reversed the District Court and held that, conditional on two facts to be determined on remand, Local 501, as an entity, is liable for a breach of its duty of fair representation based solely on the unauthorized and unratified conduct of two of its officers, which conduct is contrary to both the stated policy of the Union and to the expressed preference of Local 501's Executive Board. The action sought to be reviewed is contrary to the decisions of this Court and the subject is important in the development of federal labor law.

Additional Statement of Facts

This statement is a supplement to the statement set forth in the petition for certiorari and presumes

familiarity with the facts set forth therein.

The District Court found, and the Court of Appeals did not disburb the finding, that Local 501's Executive Board "never approved the small work agreement and ... expressed a preference for taking legal action to vacate the arbitration award which had directed the Union to sign the small work agreement." (39a)[1/]

Thus, Local 501's letter stated that petitioners' July 1986 petition asking Local 501 to commence legal action to vacate the residential agreement was rejected only because the petition had been submitted to a selected small minority of the membership who may

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1/ References are to the appendix to the petition for a writ of certiorari.

not have been adequately informed. Local 501, within a few days of receipt of the petition, sent ballots and a copy of the complete residential agreement to the entire membership to ascertain whether it wanted the Union to start legal action to vacate that agreement. The plaintiffs filed their complaint in this case on the business day immediately preceding the date set for the counting of those ballots.

I

Reasons For Granting So Much Of The Writ As Seeks Review Of The Court Of Appeals Reversal Of The District Court's Finding Of Fact In Apparent Violation Of Rule 52(a), Federal Rules Of Civil Procedure

A. Judgments and Opinions Below

The judgments and opinions below rest essentially on one findin[illegible] of

fact: whether the Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc. (the Chapter) could have reasonably relied on the actions of two officers of Local 501, Werle and Horrigan to bind the Union.

The District Court received over seventy exhibits and heard testimony from ten witnesses, witnesses having been called by all three parties. The District Court assessed the witnesses' credibility and made detailed findings of fact supported by specific references to the documentary and testimonial evidence.

The District Court found "that the Chapter was aware that ratification by the membership was required, and that it could not have reasonably relied on the actions of Werle and Horrigan ....[8]

See Tr. at 51-52, 328-329; Ex. 25."
(footnote 8 omitted now) (41a-42a)

The District Court concluded: "Nor was the Chapter entitled to rely on apparent authority." (40a)

The Court of Appeals did not question the record evidence on which the District Court relied. But it made a contrary finding, writing: "Even though the Residential Agreement had not been ratified by the membership, we conclude that, notwithstanding the issue of the duty of fair representation and disclosure owed by the Local Union's president and manager to the membership, the Chapter could reasonably believe that officers of the Local Union had authority pursuant to the arbitration award to bind the union membership." (15a)

The court of appeals did not support the above finding of fact with a single reference to any evidence. Rather it cited three decisions of other courts in other cases based on other facts, each other decision being fact specific. The opinion reads: "See NLRB v. Local 815, Int'l. Bhd. of Teamsters, 290 F.2d 99, 103 (2d Cir. 1961) (Friendly, J.) (a union may be responsible for the actions of its agents if third parties dealing with the agents reasonably believe the acts to be authorized); see also Metco Prods., Inc. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989) (same); Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1112-14 (6th Cir. 1986) (same), cert. denied, 479 U.S. 1086 (1987)." (15a)

The Court of Appeals did not cite a single iota of evidence to support the requirement that even it recognized, that the Chapter "reasonably relieve the acts to be authorized".

The District Court had written: "The fact that the actions were taken in part at the direction of the arbitrator does not change this result. The Chapter was certainly aware and should have been aware that the arbitrator's direction Arguably exceeded his powers as this Court has since found." (ftnt. 8, 41a)

The Court of Appeals countered: "Because the Chapter had no reason to doubt the authority of union officers to

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2/ The finding and holding that the arbitrators had exceeded their powers was affirmed by the Court of Appeals. (12a)

comply with an arbitration order, we think that both the Inside Wiremen's Agreement and Residential Agreement are binding upon the Local Union." (16a)

The Court of Appeals, however, did not support the above finding of fact with any reference to any evidence in the record. The Court of Appeals did not rebut any of the District Court's findings of "historical fact and the inferences therefrom" (see Karavos Compania Naviera v. Atlantica Export Corporation, 588 F.2d 1, 8 (2d Cir. 1978) (Karavos), nor did it even attempt to show that the District Court's finding was "clearly erroneous". (Rule 52(a), F.R.C.P.)

B. The Split in the Circuits.

Most of the circuits subscribe to the proposition that: "A finding that

one person is another's agent is generally reviewed as a question of fact, governed by the clearly erroneous standard .... The nature and extent of the agent's authority and whether apparent authority existed are also questions of fact." Dogherra v. Safeway Stores, Inc., 679 F. 2d 1293, 1295 (9th Cir. 1982), cert. denied 459 U.S. 990 (1982) (Dogherra).

The above quotation is cited with approval in Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F. 2d 1098 at p. 1113 (6th Cir., 1986), cert. denied 479 U.S. 1086 (1987) (Kraftco). In Kraftco the court, dealing with the question of apparent authority, stated the commonly accepted proposition that the party

seeking to establish apparent authority had the burden of proof, lists some of the facts which must be proved "At the minimum" and, quoting from Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 356 (6th Cir. 1983), wrote: "The question whether an employee is an agent is a question of fact ...." In addition to Dogherra, supra, the Court is respectfully referred to Consolidation Coal Co. v. UMW, 725 F.2d 1258, 1262-63 (10th Cir. 1984); North River Energy Corp. v. UMW, 664 F.2d 1184, 1190-1192 (11th Cir. 1981); and Mullett v. NLRB, 571 F. 2d 1292, 1294 (4th Cir. 1978) from other circuits.

In addition, the First Circuit has held that the question of apparent authority is one of fact to be determined by the trier of fact, Moreau v. James

River-Otis, Inc., 767 F.2d 6, 10-11 (1st Cir. 1985) as has the Third Circuit, Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 796 (3d Cir 1978); Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971)

The Second Circuit, on the other hand, wrote in Karavos, supra, at page 7: "Appellee's contention that 'the existence of an agency relationship is a question of fact' the decision of which by a district judge must stand unless clearly erroneous, F.R. Civ. P. 52(a), flies in the face of this court's long held position, reiterated as recently as in Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1200 n.3, ..., that '[t]he application of a legal standard to the fact is not a "finding of

fact" within the rule,' citing In re Hygrade Envelope Corp., 366 F.2d 584, 588 n.4 (2 Cir. 1966)."

To the above proposition, the Second Circuit itself has an important exception, recognizing that the clearly erroneous standard does apply to a district court's "findings which are of historical fact and the inferences therefrom ..." Karavos, supra, at page 8.

Moreover, the law in the Second Circuit on this point is itself unclear. In Lee v. Jenkins Brothers, 268 F.2d 357 (2d Cir. 1959), cert. denied 361 U.S. 913 (1959), the court wrote: "As the case may be reviewed by the Supreme Court, we shall treat each of the important and controlling questions of law raised at

the trial." 268 F. 2d at p. 360. With that as prologue, the Second Circuit further wrote: "Apparent authority is essentially a question of fact .... In certain instances a given contract may be so important to the welfare of the corporation that outsiders would naturally suppose that only the board of directors (or even the shareholders) could properly handle it .... Beyond such 'extraordinary' acts, whether or not apparent authority exists is simply a matter of fact." (footnote omitted) 268 F. 2d at p. 370

Lee v Jenkins Brothers has never been questioned or reversed by the Second Circuit, and the "Apparent authority is essentially a question of fact" language was quoted with approval

in that circuit as recently as 1985. See Utica Mutual Insurance Company v. Fireman's Fund Insurance Companies, 613 F. Supp. 1134 (S.D.N.Y. 1985).

The split in the circuits concerning the application of Rule 52(a) to findings of fact on the question of apparent authority should be resolved particularly as the question arises frequently in the area of labor law where the Congress has entrusted the development of the substantive law to the federal courts.

C. Failure of the Second Circuit To Follow Both Its Own Precedent And The Federal Labor Law

This Court has held that Congress "provided that the common law of agency shall govern in determining whether any person is acting as an

'agent' of another person." Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 217 (1979) (Carbon Fuel).

The common law is that "Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." Restatement, Second, Agency, section 8, comment (c).

The Restatement, Second, Agency, section 9 reads in material part:

"Notice

"(1) A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.

"(2) A person is given notification of a fact by another if the

latter

"(a) informed him of the fact by adequate or specified means or of other facts from which he has reason to know or should know the facts;"

One of the evidentiary sources cited by the District Court in its opinion to support its finding that the Chapter could not have reasonably relied on the actions of Werle and Horrigan, was exhibit 25. (41a-42a) Exhibit 25 is a Local 501 written brief which was served on the Chapter in a prior unrelated arbitration which explicitly stated, inter alia, that no one in the positions held by Werle and Horrigan had the authority to bind the Union to a collective bargaining agreement, or to an amendment to a collective bargaining

agreement, without the ratification of the Local 501 membership. The above finding was an "historical fact" to which even the Second Circuit admits it is bound.

The courts appear to be unanimous in holding that "an employer has no right to rely on the appearance of authority of the bargaining agent if it has knowledge to the contrary. This is an elementary principle of the law of agency." Goclowski v. Penn Central Transportation Co., 571 F. 2d 747, 759 (3 Cir. 1978) (Goclowski) And: " ... under the principles of agency, one party to a contract may not rely on an agent's authority to enter into it on behalf of his principal, when the party has knowledge of limitations placed on that grant by the agent's principal."

Goclowski, supra, at p. 756

In the instant case the District Court found as an historical fact that the Chapter had notice that Werle and Horrigan did not have authority, absent membership ratification, to bind Local 501 to a collective bargaining agreement or to an amendment thereto. The Court of Appeals did not question that finding.

Moreover, the courts also hold that the evidentiary basis for a third person to conclude that an agent has apparent authority must come from the principal. E.g. Moreau, supra, 767 F.2d at p. 9 "must be established by proof of something said or done by the principal ..."; see Kraftco, supra, 799 F. 2d at p. 1113 quoting with approval from

Moreau, "Apparent authority can, therefore, be created only by the principal's manifestation to a third party ..."

The foregoing has also been stated, but not followed in this case, by the Second Circuit quoting, with approval, Professor Mechem: "The authority of an agent, and its nature and extent ..., can only be established by tracing it to its source in some word or act of the alleged principal." Karavos, supra, 588 F.2d at p. 10

The Court of Appeals in the instant case did not support its finding of apparent authority on any act or word by the principal.

D. Conclusion

This Court wrote, in Carbon

Fuel, supra, at p. 217:

> "Congress' reason for adopting the common-law agency test, and applying to unions the common law doctrine of respondent superior, follows the lead of Mr. Chief Justice Taft in Coronado Coal Co. v. Mine Workers, 268 U.S. 295, 304 (1925), that to find the union liable 'it must be clearly shown ... that what was done was done by their agents in accordance with their fundamental agreement of association.'"

In this instant case the evidence before the District Court and Court of Appeals, which included both Exhibit 25 which, in turn, referred to the International Union's constitution as the basis for Werle's and Horrigan's lack of authority and the International Union's constitution itself, showed that what was done by Werle and Horrigan was contrary to the "fundamental agreement of association."

A writ of certiorari should be granted to resolve the split in the circuits and to decide this important question of federal labor law. The District Court's "account of the evidence is plausible in light of the record in its entirety", Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985)

II

Reasons For Granting So Much Of The Writ As Seeks Review Of The Reversal Of The District Court By Holding That, Conditional On The Determination Of Two Facts On Remand, Local 501, As An Entity, Is Liable For Breach Of Its Duty Of Fair Representation Based Solely On Unauthorized And Unratified Conduct Of Two Of Its Officers, Which Conduct Is Contrary To The Stated Policy Of The Union And To The Expressed Preference Of Local 501's Executive Board.

Petitioners and Local 501 read the decision of the Court of Appeals

differently. The petitioners read it to hold that "a breach of duty of fair representation committed by a labor union's officers is not attributable to the union if 'unauthorized,'" (petition, page 24). Local 501 reads it exactly to the contrary. The Court of Appeals wrote: "Yet we conclude that if the acts of the president and the business manager are found to violate the union's duty of fair representation, such acts should be attributable if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts." (17a) The Court of Appeals further wrote: " ... we vacate the district court's finding that the Local Union may not be held liable for any potential

breach of the duty of fair representation ..." (17a)

Local 501 considers that the petitioners have won the very point on which they seek review. The Court of Appeals, depending on further facts, would hold Local 501 liable based on the unauthorized and unratified acts of two of its officers. The case was remanded for "further factual amplification" for "a determination of whether the agents' actions constituted a breach, and whether such breach might have been avoided through institution of proper safeguards." (17a)

Reading the Court of Appeal's decision as we do, we ask this Court to grant certiorari to review the determination of the Court of Appeals on the Local's potential liability because,

if not reviewed now, the reversal of the District Court will become the law of the case and because that Court of Appeals' determination on the facts of this case fails to follow the decisions of this Court. See National Association for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 930-931 (1982); Complete Auto Transit v. Reis, 451 U.S. 401, 415-416 (1980); Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 216 (1979).

The holding that the conduct of Local 501's two officers "cannot be properly imputed to the Union" (45a) was made by the District Court on the basis of findings of fact rooted in the record and supported by references in the opinion to the particular facts of this case. (45a-46a) The Court of Appeals

reversed without disputing the District Court's findings of fact, without basing its reversal on any reference to any particular facts which it found, but writing only that "such acts should be attributable if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts." (17a) citing American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (Hydrolevel).

Local 501 does not object to or oppose the application of the "meaningful standards" test enunciated in Hydrolevel, supra, but the Court of Appeals by seeking to apply only that test has jettisoned the bulk of the law of agency relevant to this case. For, by paying no attention to the facts of this case, it

has overlooked all the applicable criteria and inquiries which ordinarily precede the application of the "meaningful standards" test. Were the law to be followed as stated by this Court, even if the facts to be determined on remand were found adversely to Local 501, the determination of the District Court should stand.

This Court has closely examined the legislative history of the Taft-Hartley Act with particular reference to union liability and the subject of agency. In treating that legislation the Court has written:

> "At the same time, Congress gave careful attention to strikes during the term of a collective-bargaining agreement, but stopped short of imposing liability upon a union for

strikes not authorized,

participated in, or ratified by it."

Carbon Fuel Co. v. UMW, 444 U.S. at p. 216

"The legislative debates and the process of legislative amendment demonstrate that Congress deliberately chose to allow a damages remedy for breach of the no-strike provision of a collective-bargaining agreement only against unions, not individuals, and, as to unions, only when they participated in or authorized the strike." (emphasis in original)

Complete Auto Transit v. Reis, 451 U.S. at p. 415-416.

NAACP v. Claiborne Hardware, supra, is a post-ASME case and actually cites ASME v. Hydrolevel at 458 U.S.

p. 930. Yet, in NAACP v. Claiborne Hardware the Court did not apply the "meaningful standards" test because it never had to reach it. The Court reviewed the facts and found that the statements attributed to an admitted agent of the NAACP were "contrary to NAACP policy" 458 U.S. at p. 930, that there was no evidence that the NAACP had ratified the violence complained of (458 U.S. at p. 930-931) or had specific knowledge of any acts of violence or threats (458 U.S. at p. 931), or had authorized the boycott which had led to threats and violence. (458 U.S. at p. 931)

It was on the basis of the above criteria, knowledge, authorization and ratification, that the District Court in the instant case found that the

conduct of two officers could not be imputed to Local 501. The application of the "meaningful standards" test will not alter the above and the law should not be changed to substitute the "meaningful standards" test for the common law criteria for determining responsibility because of an agency relationship.

Lastly, we note that there is no basis for applying other than the common law of agency standards in duty of fair representation cases. In Breininger v. Sheet Metal Workers, ___U.S.___, 110 S. Ct. 424 (1989), the case cited by petitioners, the responsibility of the union for the acts of its agent was not based on the acts of the agent alone, it was based in part on the refusal of the union itself to

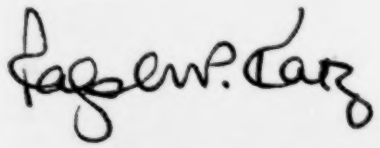
respond to the member's grievances. Thus, in Breininger, we read: "Petitioner alleges that respondent refused to honor his specific employer requests for his services and passed him over in making job referrals. He also contends that respondent refused his internal union grievances regarding these matters." 110 S. Ct. at p. 428 (emphasis added)

The "meaningful standards" test is a new legal development. This Court's exposition of its place in the fabric of the law is needed.

CONCLUSION

For all the reasons above stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,



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